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No. 06-386

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. MARGIE MCCRAE,

Petitioner,

v.

RUSSELL BERGER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner has presented no compelling reasons to justify the grant of the Petition for a Writ of Certiorari ("Petition"). In fact, Petitioner has failed to proffer any evidence to demonstrate why the questions presented merit this Court's attention. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

On March 2, 2003, Petitioner, Margie McRae, pulled into an exact change tollbooth on the F.J. Torras Causeway between Brunswick and St. Simons Island. Petitioner contends that she attempted to pay the toll but missed the basket and proceeded to get out of her truck, pick up some coins and throw them into the coin basket. As Petitioner was attempting to leave, the tollbooth operator noticed that Petitioner had additional coins in her hand and believed that she had improperly picked up these coins. The tollbooth operator demanded that Petitioner return the change still in her hand and Petitioner refused. The tollbooth operator called the police.

Respondent, Brunswick Police Department officer Berger, arrived at the scene and took a witness statement from the tollbooth operator. She told him that she saw Petitioner get out of her truck and pick up numerous coins all around the coin basket. The tollbooth operator did not state exactly how many coins Petitioner picked up.

While there is disagreement on the exact nature of the conversation that occurred between Respondent and Petitioner, Respondent believed that during the course of

that conversation, Petitioner admitted to taking money other than her own. Respondent advised Petitioner that she could be arrested, and she responded by stating that she could not be arrested on hearsay. Respondent then told Petitioner to give the money back. Petitioner responded by saying there was no proof that the money belonged to the state. Petitioner offered no other information and made no other statements about the ownership of the money. When asked if she was going to pay the toll, Petitioner replied "I have already paid the toll," without answering the question directly and with no further explanation.

After this initial exchange, Respondent asked Petitioner who owned the vehicle she was driving. Petitioner continued to refuse to answer his questions directly and responded "What do you mean whose truck is this? You just ran the registration." Respondent again restated his question, and Petitioner told Respondent that this information was irrelevant. At this point, Petitioner having refused to return the money or pay the $0.35 toll, Respondent believed that an arrest would be proper. Accordingly, he placed Petitioner under arrest, charging her with theft by conversion.

Petitioner filed an action for damages in the United States District Court for the Southern District of Georgia on March 1, 2005, asserting various state claims and a claim for unlawful arrest in violation of the 4th Amendment, based on Respondent's alleged warrantless arrest without probable cause. The District Court found that all of Petitioner's claims failed as a matter of law because Respondent was entitled to qualified immunity. The District Court held that under the facts and circumstances known at the time of the arrest, a reasonable officer in the Respondent's position could have determined that there

was probable cause to conclude that Petitioner had taken coins from the tollbooth that were not her own in violation of O.C.G.A. § 32-10-64(e). The District Court subsequently granted Respondent's Motion for Summary Judgment on all claims. On the briefs and without permitting argument, the Eleventh Circuit Court of Appeals in a per curiam opinion found no error in the decision of the District Court and affirmed the judgment in all respects. The Eleventh Circuit further denied Petitioner's Motion for Rehearing.

REASONS FOR DENYING THE PETITION

The decisions of the District Court and the Eleventh Circuit do not conflict with any decision of this Court or any other Court of Appeals. They also do not implicate an important question of federal law that has not already been decided by this Court. In addition, Petitioner raises for the first time issues here that were never presented or passed upon in the courts below. Petitioner has never before contended and no court, in articulating the questions presented, ever found that the basis for the arrest of Petitioner was the arrest warrant. This was a warrantless arrest based on probable cause. Petitioner has therefore waived argument of this issue and it is not properly before this Court. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962); *Duigan v. United States*, 274 U.S. 195, 200 (1927).

Further, Petitioner misstates the relevant ruling in this case. Neither the District Court, nor the Eleventh Circuit ever held that a police officer "may arrest if there is arguable probable cause." The judgment affirmed by the

Eleventh Circuit was the finding that a police officer is entitled to qualified immunity where a reasonable officer under the same circumstances could have concluded that there was probable cause that a crime had been committed. The District Court's discussion of arguable probable cause relates to the issue of whether an officer is entitled to qualified immunity, and not to the officer's overall authority to make a warrantless arrest under the Fourth Amendment.

I. The Eleventh Circuit and the District Court Correctly Held that Respondent Berger Was Entitled to Qualified Immunity under Federal Law

A. The District Court Correctly Applied the Relevant Standard to Determine Qualified Immunity

This Court has held that a defense based on qualified immunity must be evaluated according to a two step inquiry. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The first step in the inquiry must be whether the facts alleged show that the officer's conduct violates a constitutional right. *Id.* The second step, assuming that a violation can be made out, is whether the right was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.* at 200-02. If, under the facts alleged by the party asserting injury, no constitutional right would have been violated at all, there is no need for further inquiries concerning qualified immunity. *Id.* at 201.

The District Court considered the threshold question for qualified immunity, and viewing the facts in the light

most favorable to Petitioner, the court correctly found that no constitutional right was violated. Pet. App. at 9a. No constitutional violation can be made out on these facts, because Respondent Berger had probable cause to believe that Petitioner had committed a crime by taking coins around the tollbooth that were not her own in violation of O.C.G.A. 32-10-64(e). Petitioner asserts that Respondent Berger lacked definitive proof that she had picked up coins that were not her own and that the only reasonable interpretation of the facts was that she had merely retrieved her own coins. The District Court, however, viewing all facts in the light most favorable to Petitioner and drawing all justifiable inferences in her favor, found that Berger's interpretation of the facts and circumstances known to him at the time was a reasonable one, and thus Respondent is properly shielded from civil liability by qualified immunity. *See* Pet. App. at 9a.

The uncontroverted evidence within Respondent's knowledge at the time includes the following. First, the tollbooth operator stated that she had observed Petitioner picking up numerous coins from all around the toll basket, and stated that she saw additional coins in Petitioner's possession after the thirty-five cents required for the toll had been deposited. Petitioner makes much of the fact the tollbooth operator did not know the exact nature of the coins Petitioner picked up, nor how those coins came to be on the ground. Yet, such facts need not be proven for there to be probable cause. In fact, it was reasonable for an officer to conclude that Petitioner had picked up coins other than her own where the tollbooth operator witnessed Petitioner picking up numerous coins all around, saw her return to her vehicle with a handful of change and then witnessed her pull away with additional change still in her

hand after depositing the amount required for the toll. Likewise, it was reasonable to conclude that a person who had merely missed the basket would need to exit the vehicle only to pick up the change required to pay the toll, and would not still have a handful of change after depositing the toll.

Second, Respondent had knowledge of Petitioner's own statements regarding the money. Petitioner admits that her first statement to Respondent was that she could not be arrested on "hearsay" and that there was "no proof" that the money belonged to the state. Petitioner does not contend that she ever told Respondent that she had only picked up her own coins. Petitioner never stated that she only picked up two coins, and she does not contend that she made any other statements regarding the ownership of the coins.

Petitioner's repeated refusal to directly answer questions, together with the other facts and circumstances already known to Respondent Berger, could have caused a reasonable officer to conclude that Petitioner had committed a crime by taking coins other than her own. It was not unreasonable for an officer to conclude that a person who only asserts that there is "no proof" that the money belongs to the state, instead of affirmatively asserting that the money is their own, may be trying to conceal something, like the fact that they have just picked up coins that were not their own. The coins did not have to belong to the state for a crime to have been committed. The coins picked up only had to belong to someone other than Petitioner. Therefore, the District Court correctly held that Respondent had probable cause to believe that Petitioner had taken coins other than her own. Accordingly, because a reasonable officer under the facts alleged could have

believed that there was probable cause to arrest for a violation of O.C.G.A. § 32-10-64(e), Petitioner has not stated a violation of her Fourth Amendment rights sufficient to satisfy the first prong of the *Saucier* qualified immunity analysis.

Further, even if a constitutional violation could be made out on these facts, the District Court also correctly found that the right was not clearly established such that a reasonable officer would have understood that what he was doing violated that right. The District Court correctly found that a reasonable officer in Respondent's position, having the information he had at the time, could have concluded that there was probable cause to believe Petitioner had taken coins that were not her own. Pet. App. at 9a-10a. It would not have been at all clear to a reasonable officer that it was unlawful to arrest Petitioner where a witness saw her picking up numerous coins all around the tollbooth and drive away with additional coins still in her hand after paying the toll, and where Petitioner in response to questions would only state that there was "no proof" it was the state's money and that "hearsay" was not enough to arrest her. Therefore, in the situation confronting Respondent, it would not have been at all clear to a reasonable officer that arresting Petitioner for taking coins that were not her own was unlawful.

B. Respondent Is Entitled to Qualified Immunity if There Was Probable Cause to Believe Any Crime Had Been Committed

Although Petitioner was initially charged with theft by conversion, Respondent is still entitled to qualified immunity, so long as there was probable cause to arrest Petitioner for any crime. Throughout this case, Petitioner

has mistakenly found significant the fact that the District Court discussed probable cause in relation to O.C.G.A. § 32-10-64(e), instead of discussing probable cause in terms of either O.C.G.A. § 16-8-4, theft by conversion, the violation charged at the time of the arrest, or O.C.G.A. § 16-8-2, theft by taking, which Respondent discussed in his brief for Summary Judgment. Petitioner makes this same argument again with regard to the probable cause section of the arrest warrant which also mentions theft by conversion. However, so long as there was probable cause to believe Petitioner had committed any crime, then there was no constitutional violation and Respondent is entitled to qualified immunity. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Petitioner's argument here seems to be based on a misunderstanding of *Devenpeck v. Alford*. *Id.* The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. *Id.* In *Devenpeck*, this Court held that a warrantless arrest by a police officer is lawful under the Fourth Amendment as long as there is probable cause to believe that *any* criminal offense has been committed. *Id.* at 155.

While the facts upon which Respondent arrested Petitioner may not have supported the charge of theft by conversion, those same facts did support the belief that Petitioner had picked up coins other than her own in violation of either O.C.G.A. § 32-10-64(e), the tollbooth offense, or O.C.G.A. § 16-8-2, simple theft by taking. The District Court specifically discussed the application of O.C.G.A. § 32-10-64(e) to the facts in this case, and correctly applied the "any crime" standard announced by this Court in *Devenpeck*. *See* Pet. App. at 7a-8a. Therefore, when Respondent made an arrest supported by probable

cause to arrest for any offense, including O.C.G.A. § 32-10-64(e), neither the Respondent's subjective reliance on theft by conversion, nor the fact that he verbally announced the wrong offense, affects the fact that Respondent is entitled to qualified immunity. Because the constitutionality of the arrest does not depend on whether the officer identifies the correct offense, Respondent is still entitled to qualified immunity where there was probable cause to believe Petitioner committed a crime.

II. Qualified Immunity Does Not Depend on the Offense Being Witnessed or Committed in the Presence of the Officer

This Court has never articulated a constitutional in-the-presence requirement to arrest for a misdemeanor, and therefore the qualified immunity analysis is also not affected by whether the misdemeanor was witnessed or committed in the presence of an officer. In addition, Petitioner mistakenly concludes that because the tollbooth operator did not see the events before Petitioner picked up the coins, then the offense was "unwitnessed." However, the offense for which the District Court found probable cause was the act of picking up coins other than her own, and the record reflects and Petitioner admits that the tollbooth operator did witness Petitioner picking up numerous coins.

Further, every circuit, including the Eleventh Circuit, which has addressed the issue of whether the Fourth Amendment includes an in-the-presence requirement for warrantless misdemeanor arrests has held that it contains no such requirement. *See Knight v. Jacobsen*, 300 F.3d 1272, 1276 (11th Cir. 2002) (rejecting notion that state law procedures regarding warrantless arrests for

misdemeanors are written into the federal Constitution); *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995) (finding right to be arrested for a misdemeanor only when committed in presence of arresting officer not grounded in federal Constitution); *Fields v. City of South Houston,* 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer."); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir. 1990) ("The requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); *Street v. Surdyka,* 492 F.2d 368, 372 (4th Cir. 1974).

Any such requirement has been historically grounded in state law, and is not required by the Fourth Amendment.[1] This Court, in *Atwater v. City of Lago Vista,* noted that there is a "legislative tradition of granting warrantless misdemeanor arrest authority and [a] judicial tradition of sustaining such statutes against constitutional attack." 532 U.S. 318, 343 (2001). In addition to declining to articulate a constitutional rule that would limit warrantless arrest authority for misdemeanors beyond probable cause, this Court noted that such a requirement would require sensitive case-by-case determinations and would convert every discretionary decision by an officer in the field into an occasion for constitutional review. *Id.* at 347. To add in a requirement that a misdemeanor be "witnessed" in order for an officer to be entitled to qualified immunity would create similar problems. Therefore, since

[1] Petitioner does not now, nor has she ever raised a claim under state law regarding the authority to arrest for a misdemeanor not committed in the officer's presence.

this Court has not articulated a constitutional requirement under the Fourth Amendment that a misdemeanor be committed in the officer's presence for the arrest to be lawful, and since the actions of Petitioner were witnessed in this case by the tollbooth operator, the District Court and the Eleventh Circuit correctly determined that Respondent is entitled to the shield of qualified immunity under federal law.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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